No. [redacted] 144

IN THE

Supreme Court of the United States

TERM, 1961

STATE BOARD OF INSURANCE, ET AL,
Petitioners

v.

TODD SHIPYARDS CORPORATION,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS OF TEXAS, THIRD SUPREME JUDICIAL DISTRICT, SITTING IN AUSTIN, TEXAS.

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS OF TEXAS, THIRD SUPREME JUDICIAL DISTRICT, SITTING IN AUSTIN, TEXAS.

Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Civil Appeals of Texas for the Third Supreme Judicial District, entered in the above entitled case on November 16, 1960. Petitioner's application for writ of error to the Supreme Court of Texas was refused on February 8, 1961, and petitioner's motion for rehearing on application for writ of error was refused on March 15, 1961.

CITATIONS TO OPINIONS BELOW

The opinion of the District Court is unreported and the judgment is printed in Appendix "B" hereto, pp. B-1—B-4. The opinion of the Court of Civil Appeals, printed in Appendix "C" hereto, pp. C-1—C-12, is reported in 340 S. W. 2d 339. The opinion of the Supreme Court of Texas in refusing to grant the petitioner's application for writ of error, printed in Appendix "D" hereto, p. D-1, is reported in 349 S. W. 2d 241

JURISDICTION

The judgment of the Court of Civil Appeals was entered on November 16, 1960, (Record). Rehearing was denied on November 23, 1960, (Record). The judgment of the Supreme Court of Texas refusing to grant the petitioner's application for writ of error was entered on February 8, 1961, (Record). Rehearing on petitioner's application for writ of error was refused on March 15, 1961, (Record). The jurisdiction of this Court is invoked under 28 U.S.C., §1257(3).

QUESTION PRESENTED

Whether Texas is prohibited by the Due Process Clause of the Fourteenth Amendment of the United States Constitution from taxing insurance premiums paid by persons insuring Texas risks on insurance policies contracted for in New York.

STATUTE INVOLVED

The statutory provision involved is Section 2(e) of Article 21.38 of the Texas Insurance Code, Vol.

14, Vernon's Annotated Civil Statutes. It is printed in Appendix "A", infra.

STATEMENT

Article 21.38 of the Texas Insurance Code deals with the placing of insurance with unauthorized insurers. An "unauthorized insurer" is an insurance company not licensed to do business in Texas. Subsection (e) of Section 2 of that Act places a 5% tax on the gross premiums paid by any purchaser of insurance covering risks located within Texas from an unauthorized insurer. It is to be noted that the tax is placed upon the purchaser of insurance on risks located in Texas. Section 1 of Article 21.38 specifically states that its enactment is pursuant to the powers and privileges conferred upon the states by the McCarran Act, 15 U.S.C.A. §1011-1015.

The respondent is a New York corporation, with a certificate to do business in Texas, and for many years has owned and operated facilities at Galveston and Houston for ship repair and conversion. Approximately 27% of respondent's total volume of business is done in Texas, and it employs about 1500 people in Texas. To protect itself from risks arising out of the use of this Texas property, the respondent purchased several types of insurance from Lloyds of London and Institute of London Underwriters in New York City through certain brokers. Neither of these insurers have a permit to write insurance in Texas. Each of the policies upon which the tax was paid was contracted for, delivered, and paid for

in New York. All decisions related to the purchase of insurance and renewal of insurance, its coverage, the selection of insurers, and confirmation of insurance contracts were made in New York. All losses were payable in New York, and premiums were payable in New York. The facts of this case come within the terms of Article 21.38, Section 2(e), and the only issue raised is the constitutionality of the statute.

HOW THE FEDERAL QUESTION IS PRESENTED

The respondent paid to the Comptroller of the State of Texas the tax levied by Section 2(e) of Article 21.38 of the Texas Insurance Code, under protest. Then the respondent filed suit in the 53rd District Court of Travis County, Texas, to recover the taxes paid, alleging in its petition that the tax was unconstitutional as a violation of the Due Process Clause of the Fourteenth Amendment of the United States Constitution (R.7). The trial court found that the tax was a violation of Due Process and found for the respondent. On appeal to the Court of Civil Appeals, Third Supreme Judicial District, the petitioner, by the first point of error in its brief, asserted that the trial court was in error when it found Section 2(e) unconstitutional as a violation of Due Process, Fourteenth Amendment of the United States Constitution. The Court of Civil Appeals sustained the holding of the trial court upon the authority of *Allgeyer v. Louisiana*, 165 U.S. 528 (1896), and *St. Louis Cotton Compress Co. v. Arkansas*, 260 U.S. 347 (1922). By applica-

tion for writ of error to the Supreme Court of Texas, the petitioner in its first point of error asserted that the trial court and the Court of Civil Appeals were in error in holding Section 2(e) of Article 21.38 unconstitutional as a violation of Due Process, Fourteenth Amendment of the United States Constitution. The Supreme Court refused the petitioner's application for writ of error, and its subsequent motion for rehearing, upon the authority of *Allgeyer v. Louisiana*, *supra*, and *St. Louis Cotton Compress Co. v. Arkansas*, *supra*.

REASONS FOR GRANTING THE WRIT

1.

The decision of the court below which is decided upon the authority of *Allgeyer v. Louisiana*, and *St. Louis Cotton Compress Co. v. Arkansas*, is in conflict in principle with the more recent Supreme Court cases of *Osborn v. Ozlin*, 310 U.S. 53 (1940), *Hoopeston v. Cullen*, 318 U.S. 313, (1942), and *Travelers Health Association v. Virginia*, 339 U.S. 643 (1950).

The *Allgeyer* and the *St. Louis Cotton Compress* cases hold that a state may not tax or regulate insurance premiums on policies contracted for outside the taxing or regulating state, even though the property insured is located within the jurisdiction of the taxing or regulating state. It was said that this was an interference with the liberty of contract, and, as such, was a violation of Due Process.

The *Allgeyer* principle has been repudiated by the Supreme Court. In *Lincoln Union v. Northwestern Co.*, 335 U.S. 525 (1949), the court explicitly rejected *Adair v. U. S.*, 208 U.S. 161 (1907) and *Coppage v. Kansas*, 236 U.S. 1 (1914) (whose grandsire is *Allgeyer)*, by stating that since 1934 the United States Supreme Court had steadily been rejecting the Due Process philosophy enunciated by the *Adair-Coppage* line, and in doing so had returned closer to the earlier constitutional principle that states have power to legislate against what are to be found injurious practices in their internal commercial and business affairs. *Osborn v. Ozlin*, *supra*, *Hoopeston v. Cullen*, *supra*, and *Travelers Health Association v. Virginia*, *supra*, all expressly reject the *Allgeyer* principle and cases following its conceptualistic reasoning. Significantly, since *Osborn v. Ozlin*, each time the court has been confronted with direct precedent based upon the *Allgeyer* line it has overruled that precedent, or has in effect done so by the process of making distinctions. Thus, in *Travelers Health Association v. Virginia*, the court overruled *Minnesota Assn. v. Benn*, 261 U.S. 140 (1922); in *Watson v. Employers Liability Corp.*, 348 U.S. 66 (1954), the court in effect overruled *Hartford Accident & Indemnity Co. v. Delta & Pine Land Co.*, 292 U.S. 143 (1933).*

The authority of *Allgeyer* has been questioned to such an extent that one writer has said, "Although the *Allgeyer* case has never been overruled, it is

*See comments in dissenting opinion by Justice Black in *Clay v. Sun Ins. Co.*, 363 U.S. 207, 220 (1959).

doubtful whether the Supreme Court would reach the same result today even upon the precise fact situation involved." (Annotation to *California Automobile Association v. Maloney*, 341 U.S. 105 (1950), appearing in 95 L.Ed 805)

Significantly, the Court of Civil Appeals, below, though feeling constrained by the precedent in the *Allgeyer* and *St. Louis Compress* cases, to affirm the trial court's judgment, stated:

> "We are confident that the Supreme Court of the United States, enlightened by its own criticism of the Allgeyer and Cotton Compress cases, will, upon proper application, re-examine those cases and pronounce a decision sustaining the Legislature of Texas in enacting this statute for the protection of its citizens in a field subject to rigid regulation by the state.",

The approach now of the Court in determining the constitutionality of state regulatory matters as to Due Process is demonstrated by the following cases. That approach is not the conceptualistic one of *Allgeyer*, but rather it is an inquiry into the interest of the state in the insurance contract sought to be regulated.

Osborn v. Ozlin, 310 U.S. 53 (1940), holds that a state may require risks located within that state and insured against by an insurance company authorized to do business in that state to be purchased through registered insurance agents of that state. The court reasoned that Virginia had a definable interest in the insurance contracts sought to be reg-

ulated. By assuring that resident agents would be used to procure and service policies, Virginia was minimizing the risks of casualty and loss, thus benefiting the insurance company, the "producer" of insurance, the assured, and the community. The definable interest of Texas in the insurance contracts at bar is much clearer than in this case, and will be elaborated later in this petition. Like those in the *Osborn* case, the risks here insured against are located in Texas, and the persons upon whom the regulating measure is imposed are residents of Texas.

In *Hoopeston v. Cullen*, 318 U.S. 313 (1942), the Court upheld the validity of a New York regulation of reciprocal insurance associations even though their attorneys in fact were located in Illinois and the contracts of insurance were signed, and checks in payment of losses were mailed in Illinois. The issue in that case was whether the insurance enterprise so affected New York interests so as to give New York the power to regulate. In determining the power of the state to regulate insurance contracts, the Court rejected the conceptualistic approach, employed in *Allgeyer v. Louisiana*, of discussing the place of contracting or of performance of the contract. Instead, it recognized that a state may have substantial interests in the insurance of persons or property located within that state, and that interest may be measured by such realistic considerations as the protection of the citizen insured or the protection of the state from incidents of loss. The Court emphasized that the risks insured

against in this case were located within the regulating state.

In *Travelers Health Association v. Virginia*, 339 U.S. 643 (1950), the Virginia Corporate Commission ordered to mail-order insurance company located in Nebraska to cease from further offerings or sales of insurance to Virginia residents until it had complied with the Virginia "Blue Sky Law." The office from which it conducted a mail-order health insurance business was located in Nebraska. The policyholders mailed their assessments to Nebraska. The insurance company contended that since all of their activities took place in Nebraska, Virginia had no power to reach them in its cease and desist orders. The Court held that Virginia had a sufficient degree of interest in the insurance of its residents for its Corporate Commission to issue a cease and desist order. The Court said that the cease and desist provisions of the statute could "not be attacked merely because they affect business activities which are carried on outside the state." In this case, Virginia prohibited an insurance company from selling insurance to Virginia residents until it complied with Virginia's law. In the case at bar, Section 2(e) of Article 21.38 does not call for nearly so drastic a remedy—it does not prohibit, but simply levies a tax, and not upon an entity outside its borders, but upon persons admittedly within its jurisdiction who buy insurance from unauthorized insurers.

Some of the same issues are considered in the conflict of laws cases. It is long settled that a state may constitutionally refuse to enforce an insurance

contract or provision even though made in another state if its enforcement would be contrary to the policy of that state. In *Watson v. Employers Liability Corporation*, 348 U.S. 66 (1954), the applicability of the Louisiana direct action law to an insurance contract made in Massachusetts was involved. The plaintiff was injured in Louisiana while using a product of the insured. The insurance company contended that since the contract involved was a Massachusetts contract which forbade the plaintiff suing directly, the Louisiana direct action statute was an invalid attempt to regulate and control activities wholly beyond Louisiana boundaries. The Court held Louisiana had a valid interest in the Massachusetts contract and, as such, could apply its laws to it, and that it was immaterial that other states might also have an interest in the same transaction and might also regulate it.

To the petitioner, it is clear from these cases that the test of validity for state regulation is no longer a conceptualistic one, but rather the test is one of determining the degree of interest in the insurance contracts by the regulating state. It is then pertinent to briefly examine the interest of Texas in the insurance contracts in question.

It is at once apparent that this interest is substantial. Most important in these considerations is that the insured respondent is a Texas resident, and the property and risks insured are located in Texas. The various states have long exercised powers over property located within their respective jurisdictions. *Hoopeston v. Cullen, supra.* The in-

ability or failure of the unauthorized insurance company to pay for large casualty losses of the insured could cause catastrophic economic consequences in the Galveston and Houston area, with the ensuing burden upon state agencies to supply relief measures. The events which give rise to contractual obligation on the part of the insurance company to pay on policies will occur in Texas. Texas, or its instrumentalities, extend police protection to the insured property, and, especially in the case of losses by insured, the State will be called upon for police protection. In case of some of the insurance involved, persons compensated will be residents of Texas, and upon them will be placed the task of bringing suit in the event the unauthorized insurer denies the risk. These persons bringing suit will more than likely resort to Texas courts, and, unless they do, they will have to resort to distant forums at great trouble and expense.

Texas has a vital interest in the enforcement of laws regulating insurance on risks located in Texas. As noted by the Court of Civil Appeals, below, the insurance business has become rigidly regulated by the states to control the irresponsibility of the insurance business. As a part of this regulation, the states created insurance departments to supervise and inspect the financial condition of insurance companies doing business within the states, and to regulate policy forms and rates. This was done to protect the resident insureds from investing in contracts of insurance of companies which had not established their responsibility, financially or otherwise. However, many Texas residents were not

protected by the regulatory laws of the State since they were sold insurance on Texas risks from insurance companies not submitting to the regulatory supervision of the State. Such unauthorized companies in no way subjected themselves to the supervision and control of the State Board of Insurance. As long as this gap existed, the protection afforded by the State to its residents by its regulatory insurance program was limited.

The tax levied by Article 21.38, Section 2(e), was enacted to lessen in effect the number of insureds who were thus unprotected. If this measure is invalidated, many of the insurance companies now submitting to the supervision and control of the Texas Insurance Department will feel free to shake off the confining regulatory yoke and manage to insure Texas risks without submitting to Texas regulation by simply contracting insurance on Texas risks outside Texas.

As the regulation of insurance in Texas is designed to protect persons buying insurance on risks within Texas, it is proper that all of these risks share equally the cost of this regulation. The tax levied by Article 21.38, Section 2(e), was enacted to equalize the tax burden borne by Texas risks.* Before the enactment of Section 2(e), authorized insurance companies paid the entire tax load for

*Article 7064, Vernon's Annotated Civil Statutes, levies a 3.85% premium tax on all authorized insurance companies in addition to the various maintenance taxes: The Fire Insurance Maintenance Tax (Art. 5.49, Texas Insurance Code); The Casualty Insurance Maintenance Tax (Art. 5.24, Texas Insurance Code); and the Workmen's Compensation Insurance Comm. Tax (Art. 5.68, Texas

the regulatory supervision of the insurance industry in Texas as a consequence of insuring Texas risks, while the Texas risks insured against by unauthorized insurance companies escaped from paying any taxes. If Section 2(e) is invalidated, the authorized insurance companies will once again shoulder the entire burden of paying for the regulation of insurance in Texas. And again the temptation would be strong for authorized companies to abandon compliance with Texas law and begin underground insurance writing outside the State, as unauthorized insurers.

The petitioner submits that these interests of Texas in the insurance contracts involved here are every bit as substantial, or more substantial, than those involved in *Osborn v. Ozlin*, *Hoopeston v. Cullen*, and *Travelers Health Association v. Virginia*, *supra*.

In conclusion, the petitioner submits that the Court of Civil Appeals, below, was in error in resolving this case by a Due Process philosophy, *Allgeyer v. Louisiana*, which has been deliberately discarded by the United States Supreme Court.

2.

The importance of the question presented to the administration of insurance regulation and taxa-

Insurance Code). [The above cited Articles appear in Volume 14, Vernon's Annotated Civil Statutes.] These taxes alone aggregate 5% or more of the gross premiums, the amount levied by Section 2(e), charged and do not take in account various agency fees and filing fees paid by authorized insurers.

tion by the State of Texas has already been indicated —many Texas risks are insured with unregulated companies; the dangers of presently authorized insurance companies leaving Texas; and the inequality of the tax burden on Texas risks insured with authorized companies. This question is of vital importance to approximately 22 other states which have laws similar to Section 2(e) of Article 21.38, and unless certiorari is granted, the validity of these laws will remain in question. (See Appendix "E".)

CONCLUSION

For the foregoing reasons, we submit that this petition for a writ of certiorari should be granted.

Respectfully submitted,

WILL WILSON,
Attorney General of Texas

C. K. RICHARDS,
Assistant Attorney General

FRED B. WERKENTHIN,
Assistant Attorney General

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Austin 11, Texas

APPENDIX "A"

Article 21.38, Sec. 2(e)—Texas Insurance Code

If any person, firm, association or corporation shall purchase from an insurer not licensed in the State of Texas a policy of insurance covering risks within this State in a manner other than through an insurance agent licensed as such under the laws of the State of Texas, such person, firm, association or corporation shall pay to the Board a tax of five per cent (5%) of the amount of the gross premiums paid by such insured for such insurance. Such tax shall be paid not later than thirty (30) days from the date on which such premium is paid to the unlicensed insurer.

APPENDIX "B"

Judgment of the 53rd District Court in Todd Shipyards Corporation v. State Board of Insurance, et al, No. 112,081

ON THIS the 2nd day of February, 1960, came on to be heard in regular order the above entitled and numbered cause, in which Todd Shipyards Corporation, a New York corporation, is Plaintiff and the State Board of Insurance, a body politic duly created and existing under and by virtue of the laws of the State of Texas, Penn J. Jackson, individually and as a member of the State Board of Insurance, Robert W. Strain, individually and as a member of the State Board of Insurance, J. P. Gibbs, individually and as a member of the State Board of Insurance, William A. Harrison, Commissioner of Insurance, Will Wilson, Attorney General of the State of Texas, Robert S. Calvert, Comptroller of Public Accounts of the State of Texas, and Jesse James, Treasurer of the State of Texas, and each of them, are Defendants, when came each of the parties of record and announced ready for trial, whereupon the Plaintiff advised the court that David B. Irons, a Defendant because he was a member of the State Board of Insurance when this case was filed, was no longer a member of the State Board of Insurance and, therefore, the Plaintiff moved to dismiss the said Defendant, David B. Irons, and in Plaintiff's Eighth Amended Original Petition joined his successor, J. P. Gibbs as Defendant, and trial by jury being waived by each and all of the parties, the court proceeded and heard the pleadings, the evidence and the argument of counsel, and after

being fully apprised is of the opinion and finds that the law and the facts are with the Plaintiff, Todd Shipyards Corporation, and that Plaintiff should recover the sum of $20,605.53 of and from the State Board of Insurance and that Texas Insurance Code, Article 21.38(2)(e) is unconstitutional and void as applied to the insurance premiums described in the Plaintiff's Eighth Amended Original Petition and the taxes unlawfully exacted from Plaintiff.

IT IS, THEREFORE, ORDERED, ADJUDGED and DECREED by the Court that Plaintiff, Todd Shipyards Corporation, do have and recover of and from the State Board of Insurance, a body politic duly created and existing under the laws of the State of Texas, and the members of such Board in their representative capacities, Penn J. Jackson, Robert W. Strain and J. P. Gibbs, the sum of $20,605.53 together with the pro-rata interest earned thereon while held in suspense in accordance with the provisions of Texas Revised Civil Statutes, Article 7057b.

IT IS FURTHER ORDERED, ADJUDGED and DECREED by the Court that Jesse James, Treasurer of the State of Texas, is hereby ordered and directed to refund said $20,605.53 together with the pro-rata interest earned thereon to Plaintiff, Todd Shipyards Corporation, by the issuance and countersigning of a Refund Warrant, in accordance with Texas Revised Civil Statutes, Article 7057b, and to take any and all other action necessary to refund said moneys to Plaintiff in accordance with Texas Revised Civil Statutes, Article 7057b.

IT IS FURTHER ORDERED, ADJUDGED and DECREED by the Court that Robert S. Calvert, Comptroller of Public Accounts of the State of Texas, is hereby ordered and directed to write and sign such Refund Warrant, and, after such Warrant is properly charged against the suspense account, the said Robert S. Calvert, Comptroller of Public Accounts of the State of Texas, is hereby ordered and directed to deliver such Refund Warrant to Plaintiff, Todd Shipyards Corporation, and to take any other action necessary to refund said moneys to Plaintiff in accordance with Texas Revised Civil Statutes, rticle 7057b.

IT IS FURTHER ORDERED, ADJUDGED and DECREED by the Court that although this judgment is also against the Defendant, Will Wilson, Attorney General of the State of Texas, it is not necessary for him to take any action to accomplish the refund of the moneys unlawfully collected from the Plaintiff, and this judgment is entered against him only insofar as required by Texas Revised Civil Statutes, Article 7057b.

IT IS FURTHER ORDERED, ADJUDGED and DECREED by the Court that the Defendant, David B. Irons, should be and he is hereby dismissed without prejudice.

All costs incurred in this proceeding are taxed against the State Board of Insurance.

To the foregoing judgment of the Court, the Defendants, and each of them, duly excepted in open

court and duly gave notice of appeal to the Court of Civil Appeals for the Third Supreme Judicial District, sitting at Austin, Texas.

SIGNED at Austin, Texas this 8th day of February, 1960.

/s/ J. Harris Gardner

APPROVED AS TO FORM:

LIDDELL, AUSTIN, DAWSON & HUGGINS

By /s/ Charles R. Vickery, Jr.
Charles R. Vickery, Jr.

By /s/ Meyer W. Witt
Meyer W. Witt

Attorneys for Plaintiff

/s/ Bob Eric Shannon
Assistant Attorney General
Attorney for Defendants.

APPENDIX "C"

Opinion of the Court of Civil Appeals in State Board of Insurance, et al, v. Todd Shipyards Corporation, No. 10,802

Todd Shipyards Corporation, appellee, sued the State Board of Insurance, its members and other state officials to recover taxes paid under protest in accordance with the provisions of Art. 7057b, V.A.C.S.

The case was tried upon stipulated facts. Judgment for appellee for the taxes paid under protest was rendered.

The sole question presented is the constitutionality of the statute under which the taxes paid by appellee were exacted. This statute is Art. 21.38, Sec. 2 (e) of the Texas Insurance Code, V.A.C.S., which we quote:

> "If any person, firm, association or corporation shall purchase from an insurer not licensed in the State of Texas a policy of insurance covering risks within this State in a manner other than through an insurance agent licensed as such under the laws of the State of Texas, such person, firm, association or corporation shall pay to the Board a tax of five per cent (5%) of the amount of the gross premiums paid by such insured for such insurance. Such tax shall be paid not later than thirty (30) days from the date on which such premium is paid to the unlicensed insurer."

The following material facts are taken from the stipulation of the parties.

Todd Shipyards Corporation is a New York Corporation duly licensed to do business in Texas. Since 1934 Todd has owned real and personal property located in Texas of a value in excess of $900,000.00.

Todd has purchased insurance agreements covering Texas risks from Lloyds of London and Institute of London Underwriters of the following nature: 1. Industrial work property damage (2) Builders' risk (3) Drydocks (4) Pier and bulkhead collision (5) Product liability insurance, to the extent of the excess portion of that insurance.

Only transactions with the insurers above named are involved in this case. Each of such insurers is domiciled in London, England.

Each of the insurance agreements made the basis of the taxes involved in this suit was contracted for, delivered and paid for in New York City, New York, the domicile of Todd Shipyards Corporation.

Neither Lloyds of London nor the Institute of London Underwriters has a permit from the Texas State Board of Insurance to write insurance in Texas; neither insurer submits any statement of its condition to such Board, and the affairs of neither are subject to examination or subject to any control or supervision by such Board. Neither of such insurers has an office or agent in Texas.

Neither Lloyds of London nor the Institute of London Underwriters conducts any investigation of Texas claims in Texas, but the adjustment of losses, if, as and when occurring, are handled between Todd's agent in the New York office and the agent of Lloyds of London and the Institute of London Underwriters in New York City.

Neither Lloyds of London nor the Institute of London Underwriters has ever solicited Todd's insurance business or policies within the State of Texas.

The Texas plants or offices of Todd Shipyards Corporation do not correspond directly or indirectly nor conduct any negotiations or transactions directly or indirectly with Lloyds of London or the Institute of London Underwriters but all negotiations or transactions are handled by Todd's agent, Mr. Ed Costello, in New York City with the New York City Agents of the insurer or directly with the London office.

All decisions relative to the purchase of insurance and renewal of insurance, the extent and amount of coverage, the selection of insurance and confirmation of insurance contracts are made by Mr. Ed Costello in New York City acting for Todd Shipyards Corporation, and not in Texas.

Under these policies all losses are payable in New York City and all losses have in fact been paid in New York City. All premiums are payable in New York City and have been paid in New York City.

Todd Shipyards has its principal office, principal place of business and domicile in New York City, New York. Todd maintains and operates shipyards in New Jersey, Louisiana, Texas, California, Washington and South America.

Todd's Texas Plants are located at Pelican Island in Galveston County, Texas, and on the Houston Ship Channel in Harris County, Texas. Todd duly obtained a certificate of authority to do business in Texas issued by the Secretary of State of Texas in 1934 and has maintained such certificate in good standing and has duly filed all reports and paid all taxes, fees and charges levied against Todd for the privilege of doing business as a foreign corporation in Texas.

Since 1934 Todd has made large investments in real and personal properties essential to the conduct of its shipyard business which it has held and operated continuously since 1934.

Approximately 27% of Todd's volume of business was done in Texas in each of the years 1956, 1957, 1958 and 1959. The number of employees at the Texas plants varies with the amount of work, but in November, 1959, the number of employees was about 1500.

The principal type of activity performed at the Texas plants is similar to that in other plants located in other states, and the Galveston and Houston, Texas shipyards activity consists mainly of ship repair and conversion of ships from one type to

another, construction of vessels, various types of metal fabrication and construction, as well as the manufacture of industrial equipment and oil burners.

Todd purchased the insurance agreements of concern here through brokers located in New York and Canada, none of whom was a licensed insurance agent under the laws of Texas.

Such policies of insurance were signed and issued in England, and they state that while actual delivery is in England that the places of delivery, at the option of the insured, may be considered to be New York City. All of such policies were accepted by Todd in New York City. Most of them were for a period of one year. All renewals were negotiated outside of Texas. No premium was paid by or from Todd's plants or offices in Texas.

Todd's New York office sends copies of all policies affecting Texas plants and risks to its Texas offices.

In the case of builders' risk insurance, Todd's Texas office notifes Mr. Ed Costello in New York, Todd's New York insurance man, that Todd has entered into a construction or repair contract. Mr. Costello then applies to one of the New York insurance brokers for builders' risk insurance coverage on that particular vessel or contract; this application letter is signed by Mr. Costello in New York, an officer of the New York office, but the coverage is requested in the name of the Corporation's Texas

division and identifies Texas as the place where the work is to be performed.

When a loss occurs at the Texas plants of Todd the Texas plant informs Mr. Costello at Todd's New York office by telephone or memorandum. Mr. Costello then notifies in New York the New York brokerage house in New York that negotiated the insurance; the New York broker in turn appoints the London Salvage Association to prepare an estimate or "survey" of the loss. In some instances Todd's New York office notifies the London Salvage Association that a survey is requested. The Texas plant of Todd also appraises the amount of its loss. After appraisal, the London Salvage Association forwards its estimate or survey to Todd's New York office, and Todd then submits the survey to the particular insurance broker to be used in adjusting the amount of the loss. The local plant of Todd assists the London Salvage Association in arriving at a fair figure for the loss. The London Salvage Association issues a bill to Todd Shipyards for the London Salvage Association's service, and such bill is paid in New York City by Todd Shipyards Corporation.

The adjusting of the loss is carried on by Lloyds through the insurance broker in New York and Mr. Costello in New York. The insurance broker submits its adjustment figure and recommendation to Lloyds in London and the Institute of London Underwriters for final approval. After the figure and adjustment of loss is approved, the New York office is notified by the insurance broker or the under-

writer and the New York office then notifies the Texas plants that the claim will or will not be paid.

The tax levied by the State on premiums paid by Todd Shipyards Corporation on policies purchased from Lloyds of London and the Institute of London Underwriters, "unadmitted insurers," is at the rate of five per cent of the gross premiums. The tax on similar premiums paid to admitted insurers and persons transacting an insurance business in the State of Texas is at rates of a maximum of 3.85% to a minimum of 1.1%, Article 21.38, Texas Insurance Code and Article 7064, V. A. C. S.

The administrative agencies of the State through which the monies collected under Sec. 2(e), supra, passed, treated such funds as funds derived from occupation taxes are treated.

It is the contention of appellee that Sec. 2(e), Art. 21.38, supra, is violative of the "due process" clauses of the Constitution of the United States and Texas (Sec. I, 14th Amendment, Art. 1, Sec. 19, respectively) and of the "equality and uniformity" clause of the Texas Constitution (Secs. 1 and 2, Art. 8), and the equal protection clause of the United States Constitution (Sec. 1, 14th Amendment).

We believe that invalidity and unconstitutionality of this statute is established by the opinion of the United States Supreme Court in St. Louis Cotton Compress Company v. State of Arkansas, 260 U. S. 346, 67 L. ed. 297, from which we quote:

"This is a suit by the state of Arkansas against a corporation of Missouri authorized to do business in Arkansas. It is brought to recover 5 per cent on the gross premiums paid by the defendant, the plaintiff in error, for insurance upon its property in Arkansas, to companies not authorized to do business in the state. A statute of the state purports to impose a liability for this amount as a tax. Crawford M. Dig. (1921) Sec. 9967. The answer alleged that the policies were contracted for, delivered, and paid for in St. Louis, Missouri, the domicile of the corporation, because the rates were less than those charged by companies authorized to do business in Arkansas. It also alleged that long before the taxing act was passed the defendant had made large investments in Arkansas in real and personal property essential to the conduct of its business, which it had held and operated ever since. The plaintiff demurred. The lower court overruled the demurrer, but the supreme court sustained it, holding that the statute denied to the defendant no rights guaranteed to it by the 14th Amendment. Judgment was entered for the plaintiff, and the case was brought by writ of error to this court.

"The supreme court justified the imposition as an occupation tax,—that is, as we understand it, a tax upon the occupation of the defendant. But this court although bound by the construction that the supreme court may put upon the statute, is not bound by the characterization of it, so far as the characterization may bear upon the question of its constitutional effect. St. Louis Southwestern R. Co. v. Arkansas, 235 U. S. 350, 362, 59 L. ed. 265, 271,

35 Sup. Ct. Rep. 99. The short question is whether this so-called tax is saved because of the name given to it by the statute, when it has been decided in Allgeyer v. Louisiana, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427, that the imposition of a round sum, called a fine, for doing the same thing, called an offense, is invalid under the 14th Amendment. It is argued that there is a distinction because the Louisiana statute prohibits (by implication) what this statute permits. But that distinction, apart from some relatively insignificant collateral consequences, is merely in the amount of the detriment imposed upon doing the act. The name given by the statute to the imposition is not conclusive. Bailey v. Drezel Furniture Co., 259 U. S. 20, 66 L. ed. 817, 21 A. L. R. 1432, 42 Sup. Ct. Rep. 449; Lipke v. Lederer, 259 U. S. 557, 66 L. ed. 1061, 42 Sup. Ct. Rep. 549. In Louisiana the detriment was $1,000 Here it is 5 per cent upon the premiums,—which is 3 per cent more than is charged for insuring in authorized companies. Each is a prohibition to the extent of the payment required. The Arkansas tax manifests no less plainly than the Louisiana fine a purpose to discourage insuring in companies that do not pay tribute to the state. This case is stronger than that of Allgeyer in that here no act was done within the state, whereas there a letter constituting a step in the contract was posted within the jurisdiction. It is true that the state may regulate the jurisdiction. It is true that the state may regulate the activities of foreign corporations within the state, but it cannot regulate or interfere with what they do outside."

Judgment sustaining the statute was reversed:

We quote from appellant's brief their answer to this case:

> "The Allgeyer[1] and the St. Louis Compress cases were decided respectively in 1896 and 1922. Since then, the authority of those cases have been questioned in subsequent opinions by the United States Supreme Court. The emphasis of the Court now has moved away from the conceptualistic theories of place of contracting and performance of the contract onto the consideration of the citizen insured or the protection of the state from the incident of loss. The Osborn and Hoopeston cases,[2] supra, make it clear that the approach taken by the court to these regulatory matters has changed. As said in the Hoopeston case:
>
> > " 'In determining the power of the State to apply its own regulatory laws to insurance business activities, the question in the earlier cases became involved by conceptualistic discussion of theories of the place of contracting or preformance. More recently it has been recognized that a state may have substantial interests in the business of insurance of its people or property regardless of those isolated factors. This interest may be measured by highly realistic consideration such as the protection of a citizen insured or the protection of a state from the incidents of loss. . . .'

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[1] Cited in St. Louis Compress Co. v. Arkansas.

[2] Osborn v. Ozlin, 310 U. S. 53, 84 L. ed. 1074, Hoopeston v. Cullen, 318 U. S. 313, 87 L. ed. 777.

"The Court continued:

> " 'The actual physical signing of the contract may be only one element of a broad range of business activities. Business may be done in a state although those doing the business are scrupulously careful to see that not a single contract is ever signed within that state's boundaries. Important as the execution of a written contract may be, it is ordinarily but an intermediate step serving to tie up prior business negotiations with future consequences which themselves are the real object of the business transaction.
>
> " '. . . as the analysis of those opinions clearly indicates, the Allgeyer line of decisions canot be permitted to control cases such as this, where the public policy of the state is clear, the insured interest is located in this state and there are many points of contact between the insurer and the property in the state.' "

Neither the Cotton Compress case nor the Allgeyer case has ben overruled. For that matter, the Court expressly declined to overrule such cases in Compania Gen. De Tabacos v. Collector of Int. Rev., 275 U. S. 87, 72 L. ed. 177.

We are confident that the Supreme Court of the United States, enlightened by its own criticism of the Allgeyer and Cotton Compress cases, will, upon proper application, re-examine those cases and pronounce a decision sustaining the Legislature of Texas in enacting this statute for the protection

of its citizens in a field subject to rigid regulation by the State. Until such time, however, it is our duty to follow those cases. This we do, and affirm the judgment of the Trial Court.

Robert G. Hughes, Associate Justice,

Affirmed.

Filed: November 16, 1960.

APPENDIX "D"

Per Curiam Opinion of the Supreme Court of Texas in State of Texas v. Todd Shipyards Corporation, No. A-8150

We are of the opinion that the decision in this case is controlled by Allgeyer v. Louisiana, 165 U. S. 578, 17 S. Ct. 427, 41 L. ed. 832 and St. Louis Cotton Compress Company v. State of Arkansas, 260 U S. 346, 43 S. Ct. 125, 67 L. ed. 297. We are unwilling to take the position that in view of Osborn v. Ozlin, 310 U. S. 53, 60 S. Ct. 758, 84 L. ed. 1074 and Hoopeston Canning Co. v. Cullen, 318 U. S. 313, 63 S. Ct. 602, 87 L. ed. 777, the Supreme Court of the United States will probably overrule the Allgeyer and Cotton Compress cases. We abide by what the Supreme Court has held and refuse to speculate upon what said Court may hold. The application for a writ of error is refused, no reversible error.

APPENDIX "E"

Unauthorized Insurance State Taxation Direct Placements

State	*Rate of Tax**	*Statute***
1. Alabama	4% —imposed on person placing Insurance.	Title 28, Sec. 76, Alabama Code
2. Alaska	3% —imposed on non-admitted insurer—insured liable if insurer fails to pay tax.	Compiled Laws of Alaska, Anno. 1949 as amended, Section 42-1-15
3. Arkansas	2% of premium charged —insured required to withhold and remit amount of tax.	Arkansas Statutes, 1947, as amended, Section 66-2926
4. Florida	3% of premium charged —insured required to withhold and remit amount of tax.	Florida Statutes, as amended, Section 626. 0535
5. Georgia	Insured required to pay same rate as premium tax imposed on admitted insurer, plus license fee of insurer.	Georgia Laws of 1941, as amended, Section 56-524
6. Iowa	2% —imposed upon insurer or insured	Iowa Code 1958, as amended, Section 515. 137
7. Louisiana	5% —imposed upon insured.	Title 22, Section 1265 B. Revised Statutes of 1950, as amended.
8. Maryland	2½% of premium charged—imposed on insured.	Art. 48-a, Section 128, Annotated Code of Maryland
9. Michigan	Same rate as admitted insurers—2% fire, 3% casualty—imposed on insured.	Act 218, Public Acts 1956, Section 1840
10. Minnesota	2% —imposed upon insured who is required to obtain a license.	Minnesota Statutes 1953, as amended 1957 by Chapter 475, Section 71. 24

*Tax upon gross premiums unless otherwise noted.

**References are to Sections of the Insurance Laws or Insurance Code unless otherwise noted.

State	*Rate of Tax**	*Statute***
11. Missouri	5% of net premiums—imposed upon insured who must obtain license.	RSMo. 1949, as amended, Section 375. 100
12. Montana	2% of net premiums—imposed upon insured who must obtain license.	Chap. 286, Laws 1959, Section 40-3427
13. New Hampshire	4%—imposed upon insured.	RS N. H., Annotated, 1955, as amended §405:20
14. New Jersey	3%—imposed upon insured.	Chap. 32, Laws 1960, Section 30
15. No. Carolina	5%—insured required to withhold.	Gen. Stat. N. C. 1953, as amended Section 58-53. 3
16. Ohio	5% of gross premiums paid or payable— imposed on insured.	Rev. Code Ohio, 1953, as amended Sec. 3905. 36
17. Pennsylvania	Same rate as admitted companies—insured required to withhold and pay.	Act No. 262, July 6, 1917, P. L. 723, p. 180.
18. So. Dakota	5%—imposed on insured.	So. Dak. Code 1939, as amended, §31. 1102
19. Tennessee	Same rate as admitted insurers—tax imposed upon insured.	Tennessee Code, Section 56-318
20. Wisconsin	3% of net premiums—imposed on insurer, but insured liable if insurer fails to pay.	Wis. Stats., 1957, as amended, §76. 33
21. Wyoming	5%—imposed on insured.	Wyom. Comp. Stats. 1945 as amended, Section 32-2302
22. Idaho***	3%—imposed on insured.	Idaho Laws 1961, Ch. 330, §277

* Tax upon gross premiums unless otherwise noted.
** References are to Sections of the Insurance Laws or Insurance Code unless otherwise noted.
*** Idaho Code becomes effective January 1, 1962.